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Supreme Court, U.S.
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In the Supreme Court of the United States

JAMES W. SCHULTZ, ET AL.,
Petitioners,

v.

UNIVERSITY OF CINCINNATI
COLLEGE OF MEDICINE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio, Tenth Appellate District

PETITION FOR WRIT OF CERTIORARI

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March 1, 2011

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QUESTIONS PRESENTED FOR REVIEW

I. May a state's constitutional grant of trial by jury be abrogated when the state purports to bestow sovereign immunity on private physicians who perform surgeries on private patients at private hospitals, because those private physicians also hold part-time faculty appointments at state medical schools and medical students are present for the private surgeries?

II. Whether Ohio courts can create a new "public policy" that anytime a physician "furthers a student's education" he "promotes the State's interest" (even by the mere presence, without more, of a student at a private surgery on a private patient in a private hospital) and is therefore immune from malpractice claims; and then apply that new public policy retroactively to destroy vested rights of medical malpractice victims?

III. Is Federal Due Process violated when a State retroactively applies new case law that extinguishes vested rights and leaves malpractice victims with no remedy?

IV. May a state deny a malpractice-injured patients the constitutional right of trial by jury by permitting privately-retained physicians, who perform surgeries on private patients at private hospitals, to claim "sovereign immunity" due to being part-time position faculty members at state medical schools without disclosing such status (as part of Informed Consent)?

V. Can an alleged State employee execute a sworn affidavit that his performance of surgery is an "outside activity" of his State contract and yet claim the contrary (that his surgery is part of his State duties) to later obtain "sovereign immunity" when sued?

VI. Whether a defense attorney's representation in a deposition, relied upon by opposing counsel, that immunity does not apply is binding upon a negligent physician who eleven years later claims "immunity" just prior to trial?

VII. Where Ohio statutes provide that candidates for judgeships who exceed the age of 70 before a judicial term commences are "incompetent" to hold such judgeships, does it violate federal due process and the constitutional right to trial by jury when Ohio appoints retired judges over the age of 70 years to the Ohio Court of Claims to sit as judges and sole finders of fact of claims in which "sovereign immunity" is claimed?

VIII. Does Ohio's "State officer or employee" scheme unconstitutionally deny certain tort victims equal protection of the laws under the Fourteenth Amendment and Seventh Amendment?

IX. Whether once a State provides for a "trial by jury" does the Seventh Amendment extend Federal enforcement of such right as a fundamental right of Due Process guaranteed by the Federal Constitution?

PARTIES

Petitioner is James W. Schultz (the now voiceless patient) and his wife, Julie Schultz.

Relator is the University of Cincinnati College of Medicine Ohio (Pursuant to Ohio Rev. Code § 2743.02(E) only state agencies and instrumentalities can be defendants in original actions in the Ohio Court of Claims.)

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 9

REASONS FOR GRANTING THE PETITION ... 9

I. Certiorari should be granted to decide: May a state's constitutional grant of trial by jury be abrogated when the state purports to bestow "sovereign immunity" on private physicians who perform surgeries on private patients at private hospitals, because those private physicians also hold part-time faculty appointments at state medical schools and medical students are present for the private surgeries? 9

II. Certiorari should be granted to determine whether Ohio courts can create a new "public policy" that anytime a physician "furthers a student's education" he "promotes the State's interest" (even by the mere presence, without more, of a student at a private surgery on a private patient in a private hospital) and is therefore immune from malpractice claims; and then apply that new public policy retroactively to destroy vested rights of medical malpractice victims? 9

III. Certiorari should be granted to determine whether Federal Due Process is violated when a State retroactively applies new case law that extinguishes vested rights and leaves malpractice victims with no remedy? 10

IV. Certiorari should be granted to determine whether a State can deprive citizens of the fundamental doctrine Informed Consent by allowing physicians to operate without disclosing their part-time employment status which destroys a patient's fundamental right to a trial by jury of the physician's negligence? 15

V. Certiorari should be granted to determined if an alleged State employee can execute a sworn affidavit that his surgery is an "outside activity" of his State contract and yet be permitted to claim the contrary (that his surgery is

part of his State duties) for the purpose of obtaining "sovereign immunity" when sued? 19

VI. Certiorari should be granted to determine whether an attorney's representation in a deposition if relied upon by opposing counsel is binding upon a negligent physician who later claims "immunity" eleven years later just prior to trial. 21

VII. Certiorari should be granted to determine whether where Ohio statutes provide that candidates for judgeships who exceed the age of 70 before a judicial term commences are "incompetent" to hold such judgeships, federal due process and the constitutional right to trial by jury are violated when Ohio appoints retired judges over the age of 70 years to the Ohio Court of Claims to sit as judges and sole finders of fact of claims in which "sovereign immunity" is claimed? 23

VIII. Certiorari should be granted to determine: Does Ohio's "State officer or employee" scheme unconstitutionally deny certain tort victims equal protection of the laws under the Fourteenth Amendment and Seventh Amendment? 24

IX. Certiorari should be granted to determine whether once a State provides for a "trial by jury," does the Seventh

Amendment extend Federal enforcement of such right as a fundamental right of Due Process guaranteed by the Federal Constitution? 28

CONCLUSION 29

APPENDIX

Appendix A: Decision, In the Court of Appeals of Ohio, Tenth Appellate District, (May 11, 2010) 1a

Appendix B: Decision, Court of Claims of Ohio, (September 1, 2009) 26a

Appendix C: Entry declining jurisdiction, The Supreme Court of Ohio, (September 29, 2010) 37a

Appendix D: Reconsideration Entry denying rehearing, The Supreme Court of Ohio, (December 1, 2010) 38a

Appendix E: Constitutional and Statutory Provisions

Ohio Const. art. I, § 2 . . . . 39a

U.S. Const. amend. XIV . . 39a

Ohio Rev. Code

§ 109.36(A)(1) 40a

§ 9.86 . . . . . 41a

§ 2743.02 . . . . . 41a

TABLE OF AUTHORITIES

Cases

Adamson v. California,
332 U.S. 46 (1947) 28

Albertson v. T.J. Stevenson Co.,
749 F.2d 223 (5th Cir. 1984) 21

Baer v. Chase,
392 F.3d 609 (3d Cir. 2004) 21

Barwick v. Celotex Corp.,
736 F.2d 946 (4th Cir. 1984) 20

Betts v. Brady,
316 U.S. 455 (1942) 28

Camfield Tires, Inc. v. Michelin Tire Corp.,
719 F.2d 1361 (8th Cir. 1983) 21

Clevenger v. Univ. of Cincinnati,
2009-Ohio-2829 ..... 5, 12, 14

Colantuoni v. Alfred Calcagni & Sons, Inc.,
44 F.3d 1 (1st Cir. 1994) 20

Darnell v. Target Stores,
16 F.3d 174 (7th Cir. 1994) 21

Davis v. Harness,
38 Ohio St. 397 (1882) 18

Duncan v. Louisiana,
391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491
(1968) 24, 28

Ferguson v. Ohio State Univ. Med. Ctr.,
No. 98AP-863 (Ohio Ct. App. June 22, 1999) .. 5

Franks v. Nimmo,
796 F.2d 1230 (10th Cir. 1986) 21

Grosjean v. Am. Press Co.,
297 U.S. 233 (1936) 28

Hackman v. Valley Fair,
932 F.2d 239 (3d Cir. 1991) 21

Hake v. Geo. Wiedemann Brewing Co.,
23 Ohio St.2d 65, 262 N.E.2d 703 (1970) 22

Hayes v. Oakridge Home,
122 Ohio. St. 3d 63, 2009-Ohio-2054 16

Heffern v. Univ. of Cincinnati,
No. C-1998-02988 (Ohio Ct. Cl. Aug. 14, 2000)
(judgment) 16

James G. Smith & Assocs., Inc. v. Everett,
1 Ohio App. 3d 118 (1981) 18

Johnson v. Zerbst,
304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461
(1938) 19

Jones v. Gen. Motors Corp.,
939 F.2d 380 (6th Cir. 1991) 21

Kaiser v. Flege,
No. 98-LW-5261, unreported (Ohio Ct. App. Sept. 22, 1998) 12

Kelley v. Rossi,
395 Mass. 659, 481 N.E.2d 1340 (1985) 15

Kennedy v. Allied Mut. Ins. Co.,
952 F.2d 262 (9th Cir. 1991) 21

Martin v. Merrell Dow Pharm., Inc.,
851 F.2d 703 (3d Cir. 1988) 20, 21

McDonald v. Chicago,
130 S. Ct. 3020 (2010) 28

Palko v. Connecticut,
302 U.S. 319 (1937) 24, 28

Perma Research & Dev. Co. v. Singer Co.,
410 F.2d 572 (2d Cir. 1969) 20

Powell v. Alabama,
287 U.S. 45 (1932) 28

Radobenko v. Automated Equip. Corp.,
520 F.2d 540 (9th Cir. 1975) 21

Reid v. Sears Roebuck and Co.,
790 F.2d 453 (6th Cir. 1986) 20

Reynoldsville Casket Co. v. Hyde,
514 U.S. 749, 115 S. Ct. 1745,
131 L. Ed. 820 (1995) 2, 10, 15

Schloendorff v. Soc'y of N.Y. Hosp.,
211 N.Y. 125, 105 N.E. 92 (1914) 16

Sinskey v. Pharmacia Ophthalmics, Inc.,
982 F.2d 494 (Fed. Cir. 1992) 20

Smith v. Steinberg,
481 N.E.2d 1344, 395 Mass. 666 (1985) 15

State ex rel. Keefe v. Eyrich,
22 Ohio St. 3d 164, 489 N.E.2d 259
(1986) 3, 13, 23

Theobald v. Univ. of Cincinnati,
160 Ohio App. 3d 342, 2005-Ohio-1510 11

Theobald v. Univ. of Cincinnati,
111 Ohio St. 3d 541,
2006-Ohio-6208 ..... *passim*

Twining v. New Jersey,
211 U.S. 78 (1908) 28

United States v. McKeon,
738 F.2d 26 (2d Cir. 1984) 22

Van T. Junkins & Assocs. v. U.S. Indus. Inc.,
736 F.2d 656 (11th Cir. 1984) 21

Constitutional Provisions

Ohio Const. art. I, § 2 8
Ohio Const. art. I, § 5 ..... 8, 28
Ohio Const. art. I, § 16 ..... 1, 8, 28
Ohio Const. art. II, § 28 16
Ohio Const. art. VI, § 6 ..... 3, 23

U.S. Const. amend. VII 8, 24, 28
U.S. Const. amend. XIV 2, 8, 24, 28
U.S. Const. amend. XIV, § 1 . . . . . 2, 24
U.S. Const. art. I, § 10, cl. 1 16

Statutes

28 U.S.C. § 1257(a) 1
42 U.S.C. § 1983 17
Ohio Rev. Code § 9.86 . . . . . 4, 17, 25
Ohio Rev. Code § 109.36(A)(1) 26, 27
Ohio Rev. Code § 2743 2
Ohio Rev. Code § 2743.02 3
Ohio Rev. Code § 2743.02(E) iii
Ohio Rev. Code § 2743.03 . . . . . 3, 23
Ohio Rev. Code § 2743.03(B) 3, 13, 23
Ohio Rev. Code § 2743.03(C)(1) 3
Ohio Rev. Code § 2743.11 13

Rules

Ohio R. Civ. P. 1 22

Other Authorities

American Medical Association Judicial Counsel's Opinions and Reports, § 570 18

I-Team Preview: "Suit-Proof Physicians" http://www.wcpo.com/dpp/news/local_news/investigations/I-Team%3A-Suit-Proof-Physicians 14

OPINIONS BELOW

The relevant opinions in this matter were issued by the Ohio Court of Claims: *Schultz v. Univ. of Cincinnati Coll. of Med.*, 2008-06431, unreported, Sept. 1, 2009, App. 26a; the Tenth District Court of Appeals of Ohio: *Schultz v. Univ. of Cincinnati Coll. of Med.*, No. 09AP-900, 2010-Ohio-2071 (OHCA10, May 11, 2010), App. 1a; the Ohio Supreme Court, *Schultz v. Univ. of Cincinnati Coll. of Med.*, No. 2010-1099, unreported (Sept. 29, 2010) (refusal of jurisdiction) App. 37a; the Ohio Supreme Court, No. 2010-1099, unreported (Dec. 1, 2010) (denial of reconsideration), App. 38a.

JURISDICTIONAL STATEMENT

The Ohio Tenth District Court of Appeal's decision was issued on May 11, 2010. App. 1a. The Ohio Supreme Court denied discretionary review on Sept. 29, 2010 (unreported), App. 37a, and denied reconsideration on Dec. 1, 2010, App. 38a.

This Court has jurisdiction to issues decided by the Ohio Court of Appeal under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition addresses Ohio's constitutional guarantee of a "trial by jury" being denied by court-created pseudo-"sovereign immunity." Ohio law allegedly provides due process to its citizens guaranteed in the Ohio Constitution; "Article I, § 16 Redress in courts: All courts shall be open, and every person, for an injury done him in his land, goods,

person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Although Ohio has since passed legislation creating a "Court of Claims" (Ohio Rev. Code § 2743) this initial constitutional provision clearly waives any "sovereign immunity" and the only "courts" referred to in such constitutional provision is "All courts." Once having waived sovereign immunity the State of Ohio cannot deny citizens due process by relegating them to the court with no jury and manned by "incompetent" judges (as defined by Ohio law).

This petition also involves the issue that once a State provides a remedy for a wrong, the Federal XIV Amendment guarantee of due process prohibits the State from frustrating that right to said remedy by retroactive application of judicially-created "sovereign immunity." ("Amendment XIV (1868): Section 1. . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

This case presents that "hard case" called for in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 820 (1995), to address the inequitable results of retroactive application of new case law that destroys rights. As Justice Kennedy therein stated: "for the law in this area is, and ought to be, shaped by the urgent necessities we confront

when there is a strong case to be made for limiting relief despite the retroactive application of the law." One cannot imagine a stronger case than where patients are killed or severely injured and through subterfuge of the State and retroactivity are left with no remedy.

Ohio Rev. Code § 2743.02 states:

> State waives immunity from liability. (A)(1) The state hereby waives its immunity from liability, ... and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties.

The Ohio Court of Claims has exclusive original jurisdiction to determine immunity of claimed employees or officers. (Ohio Rev. Code § 2743.03) and consists of incumbent judges or "retired justices or judges" (Ohio Rev. Code § 2743.03(B) and Ohio Const. art. VI, § 6). This conflicts with the Ohio Supreme Court's holding in *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (Ohio 1986) which held that one is "incompetent" to run for election as a judge if over the age of seventy. Lastly, all civil actions "against the state shall be heard and determined by a single judge. (Ohio Rev. Code § 2743.03(C)(1).

STATEMENT OF THE CASE

Petitioner was a private patient of defendant Dr. Dunsker (of the Mayfield Spine Clinic). On January 13, 1997 defendant performed surgery on Petitioner's neck at The Christ Hospital, a private hospital (non-

State owned) in Cincinnati, Ohio. Post-surgery Petitioner's voice was permanently damaged and can now only speak in a soft whisper due to permanent damage to his recurrent laryngeal nerves that innervate the voice box. Defendant had to admit that the damage occurred during surgery. Petitioner timely filed a medical negligence claim against Dunsker and Mayfield in the Court of Common Pleas on July 7, 1998.

The case progressed through years of discovery (and several judges) and was finally set for trial for June 4, 2007. On May 23, 2007, (eleven days prior to trial) defendant surgeon filed a motion for a stay stating: "Defendants **now** assert ..immunity pursuant to R.C. § 9.86." [Emphasis added] (10-1/2 years after the malpractice)! In 2006 the Ohio Supreme Court issued *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208, which changed the law. *Theobald* held that physicians who hold any educational position (even part-time) with a State institution (e.g. University of Cincinnati College of Medicine) they can claim to be a "State employee" immune from suit – even when operating on a private patient at a private hospital. The *Theobald* court also specifically held that the doctor had no obligation to disclose this clandestine secret "State-employee" relationship to the patient. And, as in this case, can wait until well after the statute of limitations has run to disclose this relationship – a tactic approved by the Ohio Supreme Court.

The trial court stayed the case while Petitioner then was forced to file this separate lawsuit in the Court of Claims of Ohio for a determination of "immunity" [which, as an affirmative defense, seems

illogical that the Petitioner would have to seek this determination]. Then once Petitioner filed the action (based on defendant's motion) defendant then claimed that Petitioner missed the statute of limitations in the Court of Claims. Defense claimed Petitioner should have filed in the Court of Claims by 1998 (8 years before *Theobald* became the law). There was no dispute that defendants never informed Petitioner of any employment connection with the State of Ohio.

Over the years, as the evolution of expansion of "immunity" occurred, the lower *Theobald* court admitted that *Ferguson v. Ohio State Univ. Med. Ctr.*, No. 98AP-863 (Ohio Ct. App. June 22, 1999), "took a somewhat different tact" where the "key issue" was whether the practitioner "saw the patient only is his capacity as an attending physician supervising residents" or "saw the patient as a private patient." That is why both counsel knew that immunity did not apply since Petitioner was a private patient in 1997. Such even led to the defense counsel's concession during defendant's deposition that "I doubt very much immunity applies in this case... I would assume that it does not apply in this case" [Dunsker deposition, pp.99-100]

The Court of Claims nonetheless granted defendant surgeon herein "immunity" even though he had no recollection of the resident or what the resident did or what "education" took place. A resident's name had been entered onto a nurse's note and that was good enough for the court. The court (as in other cases) just takes the defendant's word that a resident "always is" there (See: *Clevenger v. Univ. of Cincinnati*, 2009-Ohio-2829).

Petitioner's counsel argued the Constitutional issues in the Court of Claims (court of first instance):

> "...it's a retroactive application. That's why I'm saying, as I'm sure the Court realizes, back in those days, if you will, the issue was, was it a private patient or not. And I think the law at that time, and I should say the facts, indicate clearly this was a private patient at a private hospital in Cincinnati- which is another legal issue I've been battling for years in Cincinnati. That if I go to a private hospital, how can a resident with this clandestine residency that a private patient has no knowledge of, how that can violate, I think our basic constitutional right to have due process and have a jury trial, I don't think that's fair. [Court of Claims, Immunity Hearing, Aug. 13, 2009, T.p. 9].
>
> "I think the law is that the law must be applied when the law at the time of the incident. Otherwise, we would be having, I mean, why not drag a case out like this one 20 years until you get the law changed. That isn't fair to the parties. The relationship of the parties, I think, logically and legally must be determined at the time of the incident. And what subsequently happens cannot change the legal relationship between the parties.... Mr. Schultz had a right to sue...the legislature or the courts cannot take that away if it is vested... It is only fair to the parties since the relationship at the time of the incident must govern. Because otherwise that is to take away a right, a vested right which is unconstitutional....That's just fundamentally unfair, especially when that forecloses the

> litigant from a due process right to have a trial by jury, both under the United States Constitution and the Ohio Constitution." [Court of Claims, Immunity Hearing, Aug. 13, 2009, T.p. p.64-67].

The Court of Claims went further and granted defendant's motion and dismissed with prejudice Petitioner's claim entirely. The Court held that Petitioner should have filed a case against the State of Ohio (not defendant) in its Court of Claims by 1998 even though the *Theobald* case was not decided until 2006!

Petitioner's counsel argued in the Court of Appeals First Assignment of Error:

> "So the resulting effect is that every patient who undergoes neurosurgery in Cincinnati is denied their Constitutional right to a jury trial and in most cases any reasonable right to make any recovery (since these clandestine corporate agreements are not made known until the statute of limitations has passed).
>
> The Courts are our last guardian of our Constitutional rights, a duty which should not be quelled by a public policy to provide blanket "immunity" so as to 'allow universities to attract and compensate highly qualified clinical instructors.' [*Theobald* at p. 546]."

Petitioner also raised Constitutional issues in his Fourth Assignment of Error: The trial court erred to the prejudice of plaintiffs-appellants in applying the Ohio Court of Claims Act and *Theobald* to create an

unconstitutional denial of Due Process and Equal Protection of the laws. [T.d.37].

Appellants' appeal brief stated:

> This labyrinth of masqueraded mercenaries is unconscionable and violates the Ohio and Federal Constitutions of fundamental rights of due process; trial by jury and violates Equal Protection. (violative of the Ohio State Constitution, Article I, § 5 [Trial by Jury]; Article I, § 16 [Open Courts] and the United States Constitution Amend. VII [Right of trial by jury] and XIV [due process] and the right to "equal protection"[Article I, Section 2 of Ohio Constitution and U.S. Constitutional Amendment XIV].

Petitioner's Eight Assignment of Error also stated: The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint since such application of the law violates the Equal Protection of the laws guaranteed under the Ohio and Federal Constitutions. [T.d.37]

Petitioner's Ninth Assignment of error stated: The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint by applying the law retroactively. [T.d.37]

Nonetheless, the Ohio Court of Appeals upheld the trial court holding that it would have been "prudent" for counsel to have foreseen eight years into the future

and have filed a lawsuit in 1998 in the Court of Claims even though it was not the law at the time.

The Ohio Supreme Court declined jurisdiction and denied reconsideration.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. **Certiorari should be granted to decide: May a state's constitutional grant of trial by jury be abrogated when the state purports to bestow "sovereign immunity" on private physicians who perform surgeries on private patients at private hospitals, because those private physicians also hold part-time faculty appointments at state medical schools and medical students are present for the private surgeries?**

II. **Certiorari should be granted to determine whether Ohio courts can create a new "public policy" that anytime a physician "furthers a student's education" he "promotes the State's interest" (even by the mere presence, without more, of a student at a private surgery on a private patient in a private hospital) and is therefore immune from malpractice claims; and then apply that new public policy retroactively to destroy vested rights of medical malpractice victims?**

III. Certiorari should be granted to determine whether Federal Due Process is violated when a State retroactively applies new case law that extinguishes vested rights and leaves malpractice victims with no remedy?

In *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 820 (1995), Justice Kennedy stated in his concurrence: "When a hard case presents the question of our authority to deny relief in a retroactivity case, that will be soon enough to resolve it; for the law in this area is, and ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law." This is that "strong case."

Here numerous victims of malpractice resulting in death or tragic existences have had the rug pulled out from under them by the Ohio Supreme Court's judicial activism. The court (not the legislature) determined that it would expand beyond what the law had previously been to now extend immunity to physicians even though getting privately paid for surgeries, thus shifting the cost of their negligence upon the taxpayers of Ohio.

Over the past twelve years the Courts of Ohio have issued a cascade of cases continually expanding "sovereign immunity" to protect negligent physicians in malpractice cases. The *Theobald* appellate court claims that cases since 1999 retreated from the financial factors and turned upon the "education factor." However, it was not until December 2006 when the Ohio Supreme Court issued *Theobald v.*

Univ. of Cincinnati, 111 Ohio St. 3d 541 (2006) that the "private patient" test was replaced by the "education factor" and expanded to when a physician "furthers education" in any manner he is "promoting the State's interest" and is therefore a State employee and provided immunity if there is any claim that a resident even has an "opportunity to observe." The court noted:

> [m]ost, if not all, Ohio state medical schools affiliate with separate corporations run and staffed by clinical faculty members to deal with the income generated from the clinical faculty members' practices. These corporations, or practice plans, employ the medical school clinical faculty and provide the majority of the clinical faculty members' salaries. Additionally, the practice plans are responsible for billing and collecting payments for the services the clinical faculty members provide as part of their practice of medicine....This arrangement allows universities to attract and compensate highly qualified clinical instructors while the practice groups or corporations, in turn, financially contribute to maintain the medical departments within the university.

So Ohio courts are in actuality bestowing "immunity" upon medical practice plan corporations to insulate physicians from malpractice claims at the expense of the State taxpayers. The *Theobald* appeals court specifically recognized that the University and the practice plans were "separate legal entities" but "their relationship was **sufficiently close**" that the practice-plan's employee is "an employee of the state for purposes of immunity." (*Theobald v. Univ. of*

Cincinnati, 160 Ohio App. 3d 342, 2005-Ohio-1510, 05-LW-1359, at ¶ 30). [Apparently converting corporation law to that of horse-shoes; "it's close"].

Defendant-surgeon herein performed 95% of his surgeries at Christ Hospital (the private non-State hospital). One hundred percent of his fees (from whatever source) went to the Mayfield practice plan pursuant to "an agreement with the university." In the record he testified that his charge was to be "responsible for the residents that rotated at The Christ Hospital." So how is any patient supposed to know about this "agreement" from another institution that works to take away their legal rights?

The Ohio courts have judicially recognized that "all attending physicians at UC Medical Center were, by definition, members of the faculty of the university." (*Kaiser v. Flege*, No. 98-LW-5261, unreported (Ohio Ct. App. Sept. 22, 1998)). The defendant Mayfield Clinic is the only neurosurgery residency program in Cincinnati [Ohio Court of Claims, Immunity Hearing, Aug.13, 2009, T.d. p.47, 57, l. p.19-21]. Consequently everyone undergoing neurosurgery in Cincinnati is automatically unknowingly deprived of their due process to bring a medical malpractice claim against the negligent neurosurgeon (as Petitioner herein).

The Ohio courts have even expanded this immunity when there is no evidence, granting "immunity" just on the assumption that a resident "always is" present. (*Clevenger v. Univ. of Cincinnati*, 2009-Ohio-2829, at ¶ 12)

Once a State grants a constitutional right to "trial by jury" it should not be eliminated in medical

malpractice suits by a court bestowing "sovereign immunity" as "state actors" to private physicians performing surgeries at private hospitals if they merely have, or claim to have in the vicinity a student-doctor from a State owned medical school.

This cloak of "state employee" eliminates any claim denies malpractice victims a right to a jury trial since it eliminates any claim against the negligent doctor. The only forum then available is the Ohio Court of Claims in which the only defendant is only state agencies or instrumentalities the State of Ohio. In such court there is no "trial by jury" (pursuant to Ohio Rev. Code § 2743.11). The finder of fact is, among others, appointed "retired" judges pursuant to Ohio Rev. Code § 2743.03(B). Most if not all of these judges are over the age of 70. However, judges over the age of 70 are considered "incompetent" and unable to run for public election. *State ex rel. Keefe v. Eyrich,* 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986).

Most appalling is that this new "policy" is now being retroactively applied to all pending cases including the case *sub judice* (which occurred in 1997). Petitioner herein and numerous other victims of malpractice are being retroactively denied a trial by jury and due process by this judicial activism of this State court. Going forward, this new court-created policy shifts the burden of paying for malpractice now to the taxpayers instead of the defendant's insurance company. [See: *Theobald v. Univ. of Cincinnati*, 111 Ohio St. 3d 541, 2006-Ohio-6208, Justice Pfeifer's dissent: ¶ 41, ¶ 42.]

Such policy is a legislative power and courts should not be legislating. Petitioner's case was filed in 1997,

yet was ruled in 2009 to have been time barred since he did not foresee the 2006 *Theobald* decision which removed such cases from the ordinary court system (which provides a trial by jury) to the State Court of Claims. This shocking state of affairs has been reported statewide by the media and one reporter won a statewide award for bringing this injustice to the Public's attention. (I-Team Preview: "Suit-Proof Physicians" http://www.wcpo.com/dpp/news/local_news/investigations/I-Team%3A-Suit-Proof-Physicians).

The *Theobald* case resulted in paraplegia and blindness; *Clevenger v. Univ. of Cincinnati*, 2009-Ohio-2829, resulted in death and the within case Mr. Shultz's loss of ability to talk. These are just several of the cases that have been taken up the appeals structure to have the Ohio courts shut the door in their face and deny any remedy. Numerous other malpractice victims are certainly without remedy now with this retroactive application.

Here, where a citizen seeks a "private" physician-surgeon; pays that surgeon and his medical entity for their work (does not pay the State of Ohio); has no inkling that the State is in anyway involved in his undergoing surgery at a "private" (non-State owned) hospital; he should not be secretly cheated out of his "due process" rights.

It would be analogous to you hiring a local builder to construct your dream home and pay him cash. The house crumbles to the ground. You sue him only to then learn that he has an agreement with the Russian government to have Russian students "observe" him and one might have (but not necessarily) been on your construction site. The courts hold that the contractor

therefore has "diplomatic immunity" and you learn that you should have sued Russia itself in the Hague, but your statute of limitations is gone. Is this the kind of "justice system" game that should be condoned in the United States of America?

Other courts have addressed this clandestine "loaned-resident" relationship between the State owned medical school and private doctors and have managed not to deprive their citizens of their Constitutional Rights to due process and a trial by jury. *Kelley v. Rossi,* 395 Mass. 659, 481 N.E.2d 1340 (1985); *Smith v. Steinberg*, 481 N.E.2d 1344, 395 Mass. 666 (1985).

This case provides this Court the hard case envisioned in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745, 131 L. Ed. 820 (1995), to address the issue of retroactive application of new case law that clearly results in Constitutional violations of innocent victims' rights. No more "urgent necessity" can be envisioned than to stop the continuing injustice to Ohio's malpractice victims who are without remedy. This unconscionable and outrageous legal mousetrap must be ended.

IV. Certiorari should be granted to determine whether a State can deprive citizens of the fundamental doctrine Informed Consent by allowing physicians to operate without disclosing their part-time employment status which destroys a patient's

fundamental right to a trial by jury of the physician's negligence?

When a physician does not disclose his employment status with the State of Ohio to a patient, (by which works a denial of their trial by jury), such consent is not "informed" and is invalid and a breach of contract between the patient and doctor.

The Ohio Court of Claims held in *Heffern v. Univ. of Cincinnati* No. C-1998-02988 (Ohio Ct. Cl. Aug. 14, 2000) (judgment) informed consent is not "informed" if given under false pretenses [there the perpetrator impersonated a physician when he was not. Therefore, the patients did not give "informed consent" when it was based on false representations].

The right to determine one's consent to medical treatment has been clear since 1914:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon [*130] who performs an operation without his patient's consent, commits an assault. for which he is liable in damages." (*Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) - Judge Cardozo).

The Ohio Supreme Court in *Hayes v. Oakridge Home,* 122 Ohio. St. 3d 63, 2009-Ohio-2054, reiterated its "duty to defend the right to private contract." See U.S. Const. Art. I, § 10, cl. 1; Ohio Const. art. II, § 28.

Clearly here Petitioner did not contract to have his surgery done by the State of Ohio. Petitioner had no

idea that his surgery had anything to do with the State of Ohio. In fact, if the State of Ohio has undertaken this surgery it is clearly liable for an assault under the law. This can of worms can get even more interesting in that the State taking this position can open the door for lawsuits under 42 U.S.C. § 1983 for an intentional governmental assaults. Clearly with their legal position they cannot now claim that such was not "State action" for purposes of 42 U.S.C. § 1983 purposes. In fact a class action for every neurosurgery patient in Cincinnati might be the correct response to the defendant's house of cards if this Court does not stop this continued injustice.

Petitioner herein only gave "consent" for defendant (not the State of Ohio or defendant as State employee) to perform surgery. Therefore, Petitioner should not be denied his right to trial by jury against this negligent non-disclosing defendant particularly when he did not consent to such relationship.

The Ohio Supreme Court clearly fails to understand or appreciate the doctrine of "informed consent" when it held in *Theobald:*

> {¶ 32} The Theobalds also ask us to require a health-care practitioner to obtain informed consent from a patient, except in emergency situations, in order to assert the defense of personal immunity under R.C. 9.86. The statute does not require informed consent, and we will not read such a requirement into the statute. Instead, the Theobalds should direct this argument to the General Assembly.

Part of "informed consent" is full disclosure and is important to every Ohio patient. To accept a job under false pretenses is fraud. To be working for another "employer" while being paid by another is fraud. When a physician does not disclose his employment status with the State of Ohio to a patient that works a denial of their trial by jury such consent is not "informed" and is invalid and a breach of contract between the patient and doctor. The *American Medical Association Judicial Counsel's Opinions and Reports* [Section 570] state that the surgeon's obligation to the patient requires him to perform the surgical operation "in accordance with the terms of the contractual relationship." Under *Theobald* there is an undisclosed principle to the "contract.

When a physician does not disclose his principal to a third party, the physician himself is liable for any negligence, not the undisclosed principle.

> Where the principal is undisclosed, i.e., where neither the existence of an agency nor the identity of the principal is known to the third party. Here, the dealing is held to be between the agent and the third party, and the agent is liable. *James G. Smith & Associates, Inc. v. Everett* (1981), 1 Ohio App.3d 118; See *Davis v. Harness* (1882), 38 Ohio St. 397.

Ohio's disregard of Informed Consent implies that the patient unknowingly "waives" their right to a jury trial. However it has been well established that a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary. This court has held that courts must " 'indulge every reasonable presumption against waiver' of fundamental

constitutional rights." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). While many of these cases involve criminal matters, why should a law-abiding taxpaying citizen right to trial by jury be any less protected?

This entire scheme merely implicates the State of Ohio into aiding and abetting fraud upon the Citizens of Ohio to deprive them of their basic Constitutional Rights which demonstrates the need of this Court's intervention for the sake of the Constitution.

V. Certiorari should be granted to determined if an alleged State employee can execute a sworn affidavit that his surgery is an "outside activity" of his State contract and yet be permitted to claim the contrary (that his surgery is part of his State duties) for the purpose of obtaining "sovereign immunity" when sued?

The evidence in the case *sub judice* demonstrated that the operative report was blank and no mention of any resident assisting in this surgery. However, most troubling is defendant surgeon's affidavit in this case where he swears to the University of Cincinnati that his clinical medical services were an "outside activity." [Ohio Court of Claims, Immunity Hearing, Aug. 13, 2009: **Defendant Exhibit D**: "University of Cincinnati – Annual Report of Outside Activity for Full-time Faculty" a form required to be filled-out by State employees states:

> **"Summary of all outside activity (Please list and briefly describe. Include the organization or person for whom the**

> **activity was performed, an estimate of the total time spent over what period, and any use of University resources. Use extra sheets, if necessary.):**
>
> "From September 1, 1996 through August 31, 1997, I performed [sic] at various times clinical medical services for which I am licensed on behalf of the Mayfield Clinic, the practice plan corporation in conjunction with the Department of Neurosurgery."

Not only does this affidavit clearly, under oath, prove defendant's clinical medical services were "outside" of his employment as a State employee; but further it states that these "activities listed did not interfere with" his obligation as a full-time faculty member." Logically if defendant was actually performing his duties as a State employee teaching a resident, it need not be stated that it did not "interfere" with such duties, since it would be his duties.

Courts should not permit such blatant disregard for the sworn word. The Federal Courts have recognized the importance of upholding affidavit testimony by creating the "sham affidavit" approach. Since *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 577-78 (2d Cir. 1969) every federal court of appeals has adopted some form of the sham affidavit doctrine. *See Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 498 (Fed. Cir. 1992); *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 706 (3d Cir. 1988); *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *Reid v. Sears Roebuck and Co.*, 790 F.2d

453, 460 (6th Cir. 1986); *Jones v. Gen. Motors Corp.*, 939 F.2d 380, 385 (6th Cir. 1991); *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1364-65 (8th Cir. 1983); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975); *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986); *Albertson v. T.J. Stevenson Co.*, 749 F.2d 223, 228 (5th Cir. 1984); *Van T. Junkins & Assocs. v. U.S. Indus. Inc.*, 736 F.2d 656, 657- 59 (11th Cir. 1984).

However, the Third Circuit and other courts of appeals have adopted a more flexible approach. *See Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004), *Hackman v. Valley Fair*, 932 F.2d 239, 241 (3d Cir. 1991), *Martin v. Merrell Dow Pharm., Inc.*, 851 F.2d 703, 705-706 (3d Cir. 1998); *see also Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991).

Here clear contradictory affidavit testimony is being mis-used to frustrate due process. This is a case where the Federal courts should protect the citizens' Constitutional rights of due process and prohibit such mockery by applying the sham affidavit doctrine to this situation. This contempt for the sworn word in our legal process is fundamentally unfair and to the Public appears to turns the legal system into nothing but a game. This country's highest court should not permit a State to continue to trifle and degrade our system of justice in such fashion.

VI. Certiorari should be granted to determine whether an attorney's representation in a deposition if relied upon by opposing counsel is binding upon a negligent

physician who later claims "immunity" eleven years later just prior to trial.

Statements by an attorney concerning a matter within his employment are admissible against the retaining client. (*United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984) [Accord: *Hake v. Geo. Wiedemann Brewing Co.*, 23 Ohio St.2d 65, 262 N.E.2d 703 (1970)].

Here Dr. Dunsker's counsel during his deposition when questioned about "immunity" responded: "I doubt very much immunity applies in this case... I would assume that it does not apply in this case" [Dunsker deposition, pp.99-100]

This also invokes the "professionalism" that all counsel must attend as part of our continuing legal education. If one cannot take the professional word of opposing counsel during a deposition, then what is the purpose of professionalism?

Further, if courts would now have us disregard our opponent's legal representation it would open a flood gate to wild-goose chasing issues that in fact have no place in the case which would be in direct contradiction to Ohio R. Civ. P. 1. The legal time and expense tacking down every possible theory, even if opposing counsel indicates it is not in the case would be a ridiculous system of litigation.

Lastly, we, as attorneys, are required to take continuing legal education in ethics and professionalism. If such courses on "professional" conduct" and ethics are not to be applied in the real world, then what is the purpose? Clearly Petitioners had a right to legally rely upon the legal

representations made by Dunsker's private counsel during the legal proceeding of the deposition that immunity "does not apply in this case." The lower courts to not find it waived were clearly in error and should be reversed under these circumstances.

VII. Certiorari should be granted to determine whether where Ohio statutes provide that candidates for judgeships who exceed the age of 70 before a judicial term commences are "incompetent" to hold such judgeships, federal due process and the constitutional right to trial by jury are violated when Ohio appoints retired judges over the age of 70 years to the Ohio Court of Claims to sit as judges and sole finders of fact of claims in which "sovereign immunity" is claimed?

The Ohio Court of Claims has exclusive original jurisdiction to determine immunity of claimed employees or officers. (Ohio Rev. Code § 2743.03) and consists of incumbent judges or "retired justices or judges" (Ohio Rev. Code 2743.03(B) and Ohio Const. art. VI, § 6). This conflicts with the Ohio Supreme Court's holding in *State ex rel. Keefe v. Eyrich*, 22 Ohio St. 3d 164, 489 N.E.2d 259 (1986) which held that one is "incompetent" to run for election as a judge if over the age of seventy.

Due process must be seriously questioned when the only trier of fact is legally "incompetent." For the State of Ohio to entrust the complete fact finding to only one judge who is incompetent, makes it difficult for the citizens to trust that their most important cases are being provided due process.

"The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries." (*Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968)). Here the one judge sitting as trier of fact in the Ohio Court of Claims is paid by the defendant, State of Ohio. That same objection in 1774 is no less of a concern today for fundamental fairness.

As recognized in *Palko v. Connecticut*, 302 U.S. 319 (1937) due process protects those rights that are "the very essence of a scheme of ordered liberty" and essential to "a fair and enlightened system of justice." 302 U.S. at 325. Such scheme created to Ohio can hardly be deemed such and should be declared unconstitutional due to its "incompetent" judges, questionable bias and lack of a jury.

VIII. Certiorari should be granted to determine: Does Ohio's "State officer or employee" scheme unconstitutionally deny certain tort victims equal protection of the laws under the Fourteenth Amendment and Seventh Amendment?

A statute that confers "special privileges or immunities" upon one class of persons to the exclusion of other Citizens is unconstitutional.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9.86 Immunity of public officers and employees.

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

Effective Date: 03-13-1980

109.36 Defense of officers and employees definitions.

As used in this section and sections 109.361 to 109.366 of the Revised Code:

(A)(1) "Officer or employee" means any of the following:

(a) A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state.

(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(c) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(d) A person who, at the time a cause of action against the person arises, is rendering

> medical services to patients in a state institution operated by the department of mental health, is a member of the institution's staff, and is performing the services pursuant to an agreement between the state institution and a board of alcohol, drug addiction, and mental health services described in section 340.021 of the Revised Code. [Effective Date: 04-09-2003]

When one reads these definitions in § 109.36(A)(1) involving State "officers or employees" it is apparent that three-fourths of the definition is dedicated to a special class of citizens; i.e. the medical and health care-providers. Why should these professions be treated differently than any other citizen in Ohio? When in reality it is providing a "immunity" to a special class of persons which limits or abridges the rights of victims of that class. Why should those injured by medical negligence be treated differently than those who are injured by negligent drivers of vehicles? The answer is that it Constitutionally should not. Such legislation is unconstitutional since, as it is applied in the *Theobald* line of cases, abridges an injured citizen's privileges and immunities and denies equal protection by providing immunity not available to other citizens of other occupations, other than medical. Again, why should victims of malpractice be treated differently than those injured by "motor vehicles" operated by State employees? There is no rational basis for making such a special "immunity." Since this involves the violation of a basic fundamental constitutional right it fails Constitutional review under the strict scrutiny test.

IX. Certiorari should be granted to determine whether once a State provides for a "trial by jury," does the Seventh Amendment extend Federal enforcement of such right as a fundamental right of Due Process guaranteed by the Federal Constitution?

As this court discussed "selective incorporation," in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), this case presents the question of whether the Due Process Clause of the Fourteenth Amendment makes the Seventh Amendment right to "trial by jury" binding on the States. Here the State of Ohio through its constitution provides "open courts" and "trial by jury" to its citizens. [Ohio Const. art. I, § 5; § 16]. Once a State provides those rights "of such a nature that they are included in the conception of due process of law," the Due Process Clause protects those rights against state infringement. See *Twining v. New Jersey*, 211 U.S. 78, 99 (1908); *Adamson v. California*, 332 U.S. 46 (1947); *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); *Powell v. Alabama*, 287 U.S. 45 (1932).

As this court recognized in *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968), the First Congress of the American Colonies stated trial by jury as one of "the most essential rights and liberties of the colonists." The case *sub judice* exemplifies how unfair a government system is if it denies trial by jury to its citizens. This case is the perfect example to have the Federal courts guarantee one of the "most essential rights" by utilizing the Due Process clause to apply the Seventh Amendment right to States that have allegedly promised it to their

Citizens. Such a basic fundamental essential right cannot be illusory.

Certiorari should be granted on this issue because it is an important question of federal law that has yet to be clarified. To ensure that state tort law continues to play its proper role in holding wrongdoers responsible for their own acts and not foisting it upon taxpayers and denying fundamental rights this Court should intervene to correct these erroneous decisions.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that this petition for write of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Appendix A: Decision, In the Court of Appeals of Ohio, Tenth Appellate District, (May 11, 2010) 1a

Appendix B: Decision, Court of Claims of Ohio, (September 1, 2009) 26a

Appendix C: Entry declining jurisdiction, The Supreme Court of Ohio, (September 29, 2010) 37a

Appendix D: Reconsideration Entry denying rehearing, The Supreme Court of Ohio, (December 1, 2010) 38a

Appendix E: Constitutional and Statutory Provisions

- Ohio Const. art. I, § 2 ..... 39a
- U.S. Const. amend. XIV ... 39a
- Ohio Rev. Code
  - § 109.36(A)(1) 40a
  - § 9.86 ..... 41a
  - § 2743.02 ..... 41a

APPENDIX A

IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

No. 09AP-900
(C.C. No. 2008-06431)
(REGULAR CALENDAR)

[Filed May 11, 2010]

James W. Schultz et al.,	)
	)
Plaintiffs-Appellants,	)
v.	)
	)
University of Cincinnati College of Medicine et al.,	)
	)
Defendants-Appellees.	)

D E C I S I O N

Rendered on May 11, 2010

John H. Metz, for appellants.
Richard Cordray, Attorney General, and *Brian M. Kneafsey, Jr.*, for appellee University of Cincinnati College of Medicine.

APPEAL from the Ohio Court of Claims.

BROWN, J.

{¶1} Plaintiffs-appellants, James W. Schultz and his wife, Julie Ann, appeal from a judgment of the Ohio Court of Claims finding that Stewart Dunsker, M.D., is entitled to personal immunity, pursuant to R.C. 9.86 and 2743.02(F), and that appellants' medical malpractice action against defendant-appellee, University of Cincinnati ("UC"), is barred by the applicable statute of limitations. For the following reasons, we affirm the Court of Claims' judgment.

{¶2} In 1984, Dr. Dunsker was appointed as full professor of clinical neurosurgery at UC College of Medicine, a position he retained until his retirement in 2002. As a member of the UC faculty, Dr. Dunsker's responsibilities included the supervision and instruction of neurosurgery residents who rotated through both UC Hospital and The Christ Hospital ("Christ Hospital"), a private hospital in Cincinnati. Dr. Dunsker also provided clinical care to patients at Christ Hospital through his private practice group, the Mayfield Clinic ("Mayfield").

{¶3} On January 13, 1997, Dr. Dunsker, through his private practice group, performed surgery on Schultz at Christ Hospital. Dr. Dunsker operated on Schultz's cervical spine to relieve pain and pressure originating from a vertebrae in Schultz's neck. Schultz alleges that he suffered injury to his laryngeal nerve during the operation and that such injury has permanently affected his ability to speak in a normal tone of voice.

{¶4} On July 7, 1998, appellants filed a medical malpractice action in the Hamilton County Court of

Common Pleas against Dr. Dunsker and Mayfield. The case was dismissed and refiled twice, the last refiling occurring December 20, 2005. Trial was scheduled for June 4, 2007. On May 23, 2007, Dr. Dunsker filed a motion asserting personal immunity pursuant to R.C. 9.86 and 2743.02. The common pleas court stayed the proceedings pending an immunity determination in the Court of Claims.

{¶5} Thereafter, on May 22, 2008, appellants filed a medical malpractice action in the Court of Claims against UC, Dr. Dunsker, and Mayfield, alleging that Schultz was permanently injured by Dr. Dunsker's medical negligence. Appellants also asserted that Dr. Dunsker failed to provide Schultz with sufficient, accurate information regarding the risk of injury to the laryngeal nerve so that he could give informed consent for the surgery. In addition, Schultz's wife asserted a loss of consortium claim. By entry filed May 23, 2008, the Court of Claims, noting its jurisdiction over only state agencies and instrumentalities, sua sponte dismissed Dr. Dunsker and Mayfield from the action.

{¶6} On June 17, 2008, UC filed a motion to dismiss appellants' complaint, pursuant to Civ.R. 12(B)(6), asserting, as relevant here, that appellants' action was time-barred by the four-year statute of limitations set forth in R.C. 2305.113(C)(2). Appellants responded, arguing that their complaint was timely as it was filed within one year of Dr. Dunsker's assertion of immunity. By entry dated October 2, 2008, the Court of Claims held the motion in abeyance pending its immunity determination.

{¶7} On August 13, 2009, the Court of Claims conducted an immunity hearing at which Dr. Dunsker testified. Following the hearing, the Court of Claims issued a decision concluding that Dr. Dunsker's position as a full professor at UC qualified as state employment and that he was acting within the scope of his employment while treating Schultz, principally because he was furthering the education of a neurosurgical resident during the treatment of and surgery performed on Schultz. Accordingly, the Court of Claims determined that Dr. Dunsker is entitled to immunity, pursuant to R.C. 9.86 and 2743.02(F), and that the courts of common pleas do not have jurisdiction over civil actions against him based upon his alleged action or inaction in this case. In addition, the Court of Claims granted UC's motion to dismiss, concluding that appellants' action is time-barred by the one-year statute of limitations applicable to medical malpractice claims asserted against the state. The Court of Claims entered judgment on September 1, 2009.

{¶8} On appeal, appellants assert the following errors:

> [1]. The trial court erred to the prejudice of plaintiffs-appellants in granting immunity to the [sic] Dr. Dunsker.
>
> [2]. The trial court erred to the prejudice of plaintiffs-appellants in not finding defendant had waived the issue of immunity.
>
> [3]. The trial court erred to the prejudice of plaintiffs-appellants in dismissing plaintiffs'

case and not applying the "loaned servant doctrine" to the facts.

[4]. The trial court erred to the prejudice of plaintiffs-appellants in applying the Ohio Court of Claims Act and *Theobald* to create an unconstitutional denial of Due Process and Equal Protection of the laws.

[5]. The trial court erred to the prejudice of plaintiffs-appellants by dismissing plaintiffs' case on the basis of the statute of limitations.

[6]. The trial court erred to the prejudice of plaintiffs-appellants in failing to find that defendant's breach of contract and violation of informed consent did not entitled [sic] him to personal immunity.

[7]. The trial court erred to the prejudice of plaintiffs-appellants by failing to apply fundamental agency law to the case which would not result in immunity.

[8]. The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint since such application of the law violates the [sic] Equal Protection of the laws guaranteed under the Ohio and Federal Constitutions.

[9]. The trial court erred to the prejudice of plaintiffs-appellants in finding immunity for defendant Dunsker and in dismissing plaintiffs' complaint by applying the law retroactively.

> [10]. The trial court erred to the prejudice of plaintiffs-appellants in dismissing plaintiffs' complaint by considering factual matters outside the pleadings while applying Civil Rule 12(B)(6).

{¶9} As appellants' first and ninth assignments of error are interrelated, we will address them jointly. By these assignments of error, appellants contend that the Court of Claims erred in concluding that Dr. Dunsker is entitled to personal immunity. We disagree.

{¶10} A personal immunity determination is governed by the application of R.C. 9.86 and 2743.02(F). R.C. 9.86 provides:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶11} The Court of Claims has exclusive, original jurisdiction to determine whether a state employee is personally immune from liability in a civil action under R.C. 9.86 or whether the employee's conduct was manifestly outside the scope of his employment at the time the cause of action arose. R.C. 2743.02(F); *Johns v. Univ. of Cincinnati Med. Assoc., Inc.*, 101

Ohio St.3d 234, 2004-Ohio-824, ¶1, 30. If the Court of Claims determines that the state employee is immune from personal liability, pursuant to R.C. 9.86, the claimant must assert his claims against the state and the state shall be liable for the employee's acts or omissions if a claim is timely filed in the Court of Claims pursuant to R.C. 2743.16. R.C. 2743.02(A)(2).

{¶12} Thus, in determining that a person is entitled to personal immunity under R.C. 9.86 and 2743.02(F), the Court of Claims must make two findings: (1) that the person is a state officer or employee, and (2) that the officer or employee was acting within his scope of employment and without malicious purpose, in bad faith, or in a wanton or reckless manner. *Theobald v. Univ. of Cincinnati,* 111 Ohio St.3d 541, 2006-Ohio-6208, ¶14. Findings supported by some competent, credible evidence will not be disturbed on appeal as being against the manifest weight of the evidence. *Theobald v. Univ. of Cincinnati,* 160 Ohio App.3d 342, 2005-Ohio-1510, ¶22, citing *Smith v. Univ. of Cincinnati*, 10th Dist. No. 01AP-404, 2001-Ohio-3990.

{¶13} The determination as to whether or not a person is entitled to immunity under R.C. 9.86 and 2743.02(F) is a question of law. *Barkan v. Ohio State Univ.,* 10th Dist. No. 02AP-436, 2003-Ohio-985, ¶11. However, the question of whether a person acted manifestly outside the scope of his or her employment is a question of fact. Id.

{¶14} As noted, the first step in an immunity analysis is to determine whether the person is a state employee. R.C. 109.36(A)(1)(a) defines a state employee as "[a] person who, at the time a cause of

action against the person arises, * * * is employed by the state." The Court of Claims found that Dr. Dunsker's position as a full-time professor at UC qualified him as a state employee. The evidence presented at the immunity hearing supports this conclusion. Dr. Dunsker testified that, in 1984, he was appointed a full professor of clinical neurosurgery at UC's College of Medicine and that he retained that position until his retirement in 2002. Dr. Dunsker produced a letter, dated June 1, 1996, from the Dean of the College of Medicine approving his reappointment as "Professor of Clinical Neurosurgery" effective September 1, 1996 through August 31, 1999. Dr. Dunsker also produced a form entitled "Annual Report of Outside Activity For Full-time Faculty," in which he reported that, from September 1, 1996 through August 31, 1997, he performed clinical medical services on behalf of Mayfield in addition to his full-time faculty employment. In addition, Dr. Dunsker testified that he received an annual salary from UC; he produced a W-2 form showing that he earned $40,478.73 during 1997 from his employment with UC.

{¶15} Despite this evidence, appellants argue that Dr. Dunsker was not a state employee when he performed the surgery because he was simultaneously employed by Mayfield. Dr. Dunsker's employment with a private practice group does not negate his status as a state employee. In *Theobald*, 2005-Ohio-1510, this court found that a physician was a state employee for purposes of R.C. 109.36(A)(1)(a), despite the fact that he was also employed by a private practice group. Id. at ¶23-24. The evidence upon which we relied in so finding is strikingly similar to that presented by Dr. Dunsker in the instant case. Accordingly, we find that competent, credible evidence supports the Court of

Claims' conclusion that Dr. Dunsker was a state employee at the time he operated on Schultz.

{¶16} As there is no assertion on appeal that Dr. Dunsker acted with malice, in bad faith, or in a wanton or reckless manner in his care and treatment of Schultz, the issue resolves to whether he was acting within the scope of his state employment at the time the alleged negligence occurred. In *Theobald*, 2006-Ohio-6208, the Supreme Court of Ohio noted that, "[f]or purposes of personal immunity under R.C. 9.86, a state employee acts within the scope of employment if the employee's actions are 'in furtherance of the interests of the state.' " Id. at ¶15, quoting *Conley v. Shearer*, 64 Ohio St.3d 284, 287, 1992-Ohio-133. The court stated that "a state employee's duties should define the scope of employment." Id.

{¶17} The court acknowledged that the dual nature of a physician's employment as both private practitioner and employee of a state medical institution has posed problems for courts in identifying an appropriate analysis for resolving the scope of employment issue. " 'In many instances, the line between these two roles is blurred because the practitioner may be teaching by simply providing the student or resident an opportunity to observe while the practitioner treats a patient.' " Id. at ¶16, quoting *Theobald*, 2005-Ohio-1510, ¶34.

{¶18} The court conducted an exhaustive analysis of this court's previous jurisprudence on the scope of employment issue. The court noted that, in early cases, this court analyzed billing procedures and other financial factors, including the comparison of a

practitioner's financial gain with the university's financial gain from the medical treatment. Id. at ¶17, citing *Katko v. Balcerzak* (1987), 41 Ohio App.3d 375; *York v. Univ. of Cincinnati Med. Ctr.* (Apr. 23, 1996), 10th Dist. No. 95API09-1117; and *Kaiser v. Flege* (Sept. 22, 1998), 10th Dist. No. 98AP-146. In cases focusing on financial factors, the physician was inevitably found not to be immune.

{¶19} The court observed that, in *Norman v. Ohio State Univ. Hosp.* (1996), 116 Ohio App.3d 69, we expanded our analysis to examine the physician's relationship with the patient in addition to the university's financial benefit. *Theobald,* 2006-Ohio-6208, ¶18. Continuing its review, the Supreme Court of Ohio noted that, in *Ferguson v. Ohio State Univ. Med. Ctr.* (June 22, 1999), 10th Dist. No. 98AP-863, this court explained that billing practices, although relevant, do not necessarily establish when a physician is acting within his or her scope of employment with the state. We determined that the key issue is whether the physician " 'saw the patient only in his capacity as an attending physician supervising residents * * * or whether he saw the patient as a private patient.' " *Theobald,* 2006-Ohio-6208, ¶19, quoting *Ferguson.* The court next observed that, after *Ferguson,* we began to emphasize the physician's role at the time of treatment over the financial factors. *Theobald,* 2006-Ohio-6208, ¶20, citing *Hopper v. Univ. of Cincinnati* (Aug. 3, 2000), 10th Dist. No. 99AP-787, and *Kaiser v. Ohio State Univ.,* 10th Dist. No. 02AP-316, 2002-Ohio-6030.

{¶20} The court then examined our decision in *Theobald,* 2005-Ohio-1510. The court noted that we found the financial factors generally had little bearing on whether a physician is acting within the scope of

employment. *Theobald*, 2006-Ohio-6208, ¶22, citing *Theobald*, 2005-Ohio-1510, ¶46. The court agreed, stating that "[t]he financial factors may be relevant to the practitioner's status as a state employee; however, they do not necessarily establish whether he or she was within the scope of that employment at the time a cause of action arose. Instead, the question of scope of employment must turn on what the practitioner's duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury." *Theobald*, 2006-Ohio-6208, ¶23.

{¶21} The court noted both our conclusion that the physician's duties included the education of students and residents and our instructions to the Court of Claims to " 'first identify the aspect of the course of treatment that the plaintiff alleges gave rise to damage or injury,' then to 'inquire whether the practitioner was educating a student or resident while rendering the allegedly negligent care to the patient.' " *Theobald*, 2006-Ohio-6208, ¶24, quoting *Theobald*, 2005-Ohio-1510, ¶46, 48. The court approved this approach, finding that it "follows the language and intent of R.C. 9.86 and correctly focuses upon the purpose of the employment relationship, not on the business or financial arrangements between the practitioner and the state." *Theobald*, 2006-Ohio-6208, ¶25. The court further stated that "R.C. 9.86 is inclusive and makes no exception for persons who may simultaneously have other employment interests. It provides immunity for all state employees as long as they are acting within the scope of their employment when the injury occurs." Id. The court observed that application of this approach inevitably results in a determination that the physician is entitled to immunity. Id.

{¶22} The Supreme Court of Ohio distinguished the above cases from those where the "employee's actions are self-serving or have no relationship to the employer's business." *Theobald*, 2006-Ohio-6208, ¶28. In such cases, the conduct is " 'manifestly outside the scope of employment,' and R.C. 9.86 does not apply." Id., citing *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 59; *Hidey v. Ohio State Hwy. Patrol* (Sept. 22, 1998), 10th Dist. No. 97API12-1587. As examples, the court cited *Johnson v. Univ. of Cincinnati,* 10th Dist. No. 04AP-926, 2005-Ohio-2203, a case where the physician treated the plaintiff at the clinic without a student or resident in attendance, and *Wayman v. Univ. of Cincinnati Med. Ctr.* (June 22, 2000), 10th Dist. No. 99AP-1055, a case where the physician treated the plaintiff as a private patient at his own office, not while he was teaching at the hospital, and his practice plan had billed for and received the proceeds from his services.

{¶23} Following its examination of this court's jurisprudence on the scope of employment issues, the court concluded that, once a court determines that a health-care practitioner is a state employee, "the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting 'manifestly outside the scope of employment' for purposes of R.C. 9.86. If there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred." *Theobald*, 2006-Ohio-6208, ¶31.

{¶24} In the instant case, the Court of Claims, applying *Theobald*, 2006-Ohio-6208, concluded that Dr. Dunsker is entitled to personal immunity because his duties as a professor of clinical neurosurgery at UC included the education of residents and a resident was present for the purpose of education at the time the alleged negligence occurred. Appellants claim that the Court of Claims erred in retrospectively applying *Theobald*, a 2006 decision, to the instant case, the facts of which occurred in 1997. Appellants argue that the Court of Claims should have applied the case law as it existed in 1997, and determined Dr. Dunsker's personal immunity by examining billing procedures to determine whether Mayfield or UC had the most significant financial involvement in the provided treatment, rather than considering whether Dr. Dunsker was engaged in the education of a resident while treating Schultz.

{¶25} The *Theobald* court had discretion to apply its decision only prospectively. *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327 (holding in paragraph two of the syllabus that an Ohio court has discretion to apply its decision only prospectively after weighing certain factors). Nothing in *Theobald* suggests that the court intended its decision to be applied prospectively only. Cf. *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 124 Ohio St.3d 1215, 2009-Ohio-6425, ¶4 ("[t]he holding in [*Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058] shall apply only to cases filed on and after June 15, 2009, the date on which the opinion in [*Medcorp*, 2009-Ohio-2058] was published in the Ohio Official Reports advance sheets"); *State ex rel. Adams v. Aluchem, Inc.*, 104 Ohio St.3d 640, 2004-Ohio-6891, ¶8 ("[w]e agree with

claimant's contention that our decision in [*State ex rel.*] *Thomas* [*v. Indus. Comm.* (Dec. 19, 2000), 10th Dist. No. 00AP-289], must be applied retrospectively because we did not expressly state that the decision was to be applied only prospectively"). Although appellants' counsel strongly disagrees with the holding in *Theobald*, 2006-Ohio-6208, we must apply the law as set forth by the Supreme Court of Ohio. See *State v. Horton,* 10th Dist. No. 06AP-311, 2007-Ohio-4309, ¶60 (noting a court of appeals is bound by and must follow decisions of the Supreme Court of Ohio unless and until they are reversed or overruled).

{¶26} As noted, *Theobald*, 2006-Ohio-6208, instructs that a physician acts within the scope of his state employment when the physician's duties include the education of students and residents and the physician was in fact educating a student or resident when the alleged negligence occurred. Here, the Court of Claims found that Dr. Dunsker's duties as a professor of clinical neurosurgery at UC included the education of residents and that a resident was present for the purpose of education at the time the alleged negligence occurred. The evidence presented at the immunity hearing supports this conclusion. Dr. Dunsker testified that his faculty responsibilities at UC included the supervision and instruction of neurosurgery residents who rotated through Christ Hospital. He further testified that, although he did not expressly recall Schultz's surgery, the "Record of Operation" completed by the circulating nurse during surgery indicated that one of his neurosurgery residents, Dr. Kokkino, was present. Dr. Dunsker produced the "Record of Operation," which confirms his testimony. Dr. Dunsker further testified that his usual practice was to instruct neurosurgical residents

in performing various procedures during surgery and, since Dr. Kokkino was listed on the "Record of Operation" as the attending neurosurgical resident, he would have provided this same type of instruction to Dr. Kokkino during Schultz's surgery. Indeed, Dr. Dunsker testified that, pursuant to his usual teaching methods, he would have had Dr. Kokkino assist him during surgery, either by performing opening or closing procedures or assisting in retraction. Accordingly, based upon the evidence in the record, we find that competent, credible evidence supports the Court of Claims' conclusion that Dr. Dunsker acted within his scope of employment while treating Schultz.

{¶27} In short, the evidence provided by Dr. Dunsker at the immunity hearing supports the Court of Claims' conclusion that he is entitled to personal immunity under R.C. 9.86 and 2743.02, as he was a state employee acting within the scope of his employment when the alleged negligence occurred. Accordingly, we overrule appellants' first and ninth assignments of error.

{¶28} Appellants' second assignment of error contends that the Court of Claims erred in failing to find that Dr. Dunsker waived the issue of immunity. At the immunity hearing, appellants introduced the September 1, 1999 deposition of Dr. Dunsker taken in the Hamilton County case. During the deposition, Schultz's counsel noted that Dr. Dunsker had asserted the defense of immunity in his answer. When counsel asked Dr. Dunsker what the term "immunity" referred to, Dr. Dunsker's counsel interjected, stating "I threw that in as I always do in these cases. I doubt very much immunity applies in this case." Sept. 1, 1999 Depo., at 99. Schultz's counsel then averred, "Then we

won't have to get into that." Sept. 1, 1999 Depo., at 99. Dr. Dunsker's counsel replied, "We can talk about that separately, but I would assume that it does not apply in this case." Sept. 1, 1999 Depo., at 100. Schultz's counsel then stated: "Okay. I didn't know if we needed to go down that whole route." Sept. 1, 1999 Depo., at 100. Appellants argue the statements made by Dr. Dunsker's counsel during the foregoing exchange constituted an express waiver of immunity.

{¶29} "Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory or constitutional." *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, ¶49. A party asserting waiver must prove it by establishing a clear, unequivocal, decisive act by the other party demonstrating the intent to waive. *N. Olmsted v. Eliza Jennings, Inc.* (1993), 91 Ohio App.3d 173, 180, citing *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 198-99. The Court of Claims found the colloquy between counsel insufficient to support a finding that Dr. Dunsker communicated his intent to waive the defense of immunity. However, while the Court of Claims has exclusive jurisdiction to determine the issue of immunity, the issue of waiver should have been determined by the court of common pleas.

{¶30} In *Cooperman v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191, the Supreme Court of Ohio held that courts of common pleas have jurisdiction to make R.C. 9.86 immunity determinations. In response to that decision, the General Assembly amended R.C. 2743.02 and added subsection (F), which provides that the Court of Claims has exclusive, original jurisdiction to determine, initially, whether a state officer or

employee is entitled to personal immunity under R.C. 9.86, and whether the courts of common pleas have jurisdiction over the action. In making the personal immunity determination, the Court of Claims must specifically address (1) whether the person is a state officer or employee, and (2) whether the officer or employee was acting within his or her scope of employment and without malicious purpose, in bad faith, or in a wanton or reckless manner. In *Johns*, 2004-Ohio-824, the Supreme Court of Ohio held that the General Assembly's addition of R.C. 2743.02(F) reflected the legislative intent to supersede its ruling in *Cooperman*.

{¶31} In amending R.C. 2743.02(F), the General Assembly did not state that the Court of Claims has exclusive, original jurisdiction to determine whether a state officer or employee has waived the right to assert personal immunity under R.C. 9.86. The Court of Claims has only the jurisdiction that is conferred upon it by the General Assembly. *Wirick v. Transport America,* 10th Dist. No. 01AP-1268, 2002-Ohio-3619, ¶11, citing *Steward v. State* (1983), 8 Ohio App.3d 297, 299. Because the General Assembly did not specifically make the issue of waiver a matter under the exclusive, original jurisdiction of the Court of Claims, pursuant to R.C. 2743.02(F), we believe this issue remains within the jurisdiction of the court of common pleas. Thus, the Court of Claims was not the proper forum to determine the issue of waiver and, therefore, this court will not address that issue. Accordingly, appellants' second assignment of error is hereby rendered moot.

{¶32} Appellants' third assignment of error contends the Court of Claims erred in failing to address the issue of "loaned servant." Appellants

maintain that Dr. Dunsker, as a "loaned servant" of Christ Hospital, had no immunity despite his state employment with UC. The Supreme Court of Ohio rejected an identical argument in *State ex rel. Sanquily v. Lucas Cty. Court of Common Pleas* (1991), 60 Ohio St.3d 78, 79 (stating that "[i]rrespective of whether Sanquily was a 'loaned servant,' he was employed by the state when the cause of action arose. He was therefore an 'officer or employee' of the state for purposes of R.C. 2743.02(F)." We thus overrule the third assignment of error.

{¶33} Appellants' fourth and eighth assignments of error allege that the Court of Claims' application of R.C. 2743.02 in deciding Schultz's case deprived him of his constitutional right to jury trial and equal protection. This court has consistently held to the contrary. See *Lippert v. Med. College of Ohio* (Dec. 1, 1992), 10th Dist. No. 92AP741; *Ashcraft v. Univ. of Cincinnati Hosp.*, 10th Dist. No. 02AP-1353, 2003-Ohio-6349; *Fisher v. Univ. of Cincinnati Med. Ctr.* (Aug. 25, 1998), 10th Dist. No. 98AP-142. We therefore overrule appellants' fourth and eighth assignments of error.

{¶34} Appellants contend in their fifth assignment of error that the Court of Claims erred by dismissing their complaint against UC on statute of limitations grounds. We disagree.

{¶35} In deciding whether to dismiss a complaint, pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, the trial court must presume all factual allegations in the complaint are true and construe the complaint in a light most favorable to the appellants, drawing all reasonable

inferences in their favor. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss the complaint, it must appear beyond doubt from the complaint that appellants can prove no set of facts entitling them to recovery. *O'Brien v. Univ. of Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

{¶36} The Court of Claims determined that the applicable statute of limitations bars the medical negligence allegations of appellants' complaint. A complaint may be dismissed under Civ.R. 12(B)(6) as time-barred under the statute of limitations if the face of the complaint makes clear that the action is time-barred. *Steiner v. Steiner* (1993), 85 Ohio App.3d 513, 518-19. Only where the complaint demonstrates conclusively on its face that the action is time-barred should a Civ.R. 12(B)(6) motion to dismiss based upon the statute of limitations be granted. *Swanson v. Boy Scouts of Am.*, 4th Dist. No. 07CA663, 2008-Ohio-1692, ¶6.

{¶37} Appellants' complaint plainly presents allegations of medical negligence. The complaint likewise plainly sets forth the date when appellants contend the medical negligence occurred. Accordingly, the applicable statute of limitations may be applied to the dates presented in appellants' complaint to determine whether the appropriate statute of limitations time-bars appellants' complaint.

{¶38} Under R.C. 2743.02(A)(1), the state "waives its immunity from liability * * * and consents to be sued, * * * subject to the limitations set forth in this chapter." With exceptions not relevant here, R.C. 2743.16(A) states the applicable statute of limitations

for civil actions against the state. According to R.C. 2743.16(A), such actions "shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." Insofar as appellants assert a claim for medical negligence, the applicable statute of limitations is R.C. 2305.113(A), as it governs such actions between private parties and is shorter than the two-year statute of limitations in R.C. 2743.16(A). R.C. 2305.113(A) states that "an action upon a medical * * * claim shall be commenced within one year after the cause of action accrued." Appellants' medical negligence allegations arise out of Dr. Dunsker's alleged surgical error. Appellants' complaint specifies that Dr. Dunsker's medical negligence occurred during surgery on January 13, 1997. Because their complaint was not filed until May 22, 2008, the Court of Claims determined that it is untimely under R.C. 2305.113(A) and is therefore time-barred.

{¶39} Appellants contend that it is unfair and unreasonable to expect a medical malpractice plaintiff to bring suit in the Court of Claims before the plaintiff knows of the existence of a resident or has reason to believe that there is any other issue making the Court of Claims the appropriate forum in which to file suit. More specifically, appellants contend they did not discover the existence of Dr. Kokkino, the neurosurgery resident, or had any other reason to believe there was any issue making the Court of Claims the appropriate forum in which to file suit until Dr. Dunsker filed his motion asserting personal immunity on May 23, 2007. Appellants thus contend their claim was not time-barred because they filed it within one year of Dr. Dunsker's assertion of immunity.

{¶40} Appellants' argument is without merit. The discussion between counsel during Dr. Dunsker's September 1999 deposition clearly establishes that he asserted a claim of immunity in his answer to appellants' 1998 complaint. Further, Schultz's medical chart includes a "Record of Operation" completed by the circulating nurse during Schultz's surgery indicating that a neurosurgery resident, Dr. Kokkino, was present during the surgery. Medical malpractice appellants have a duty to examine medical records to ascertain the identity of medical personnel who may have rendered negligent care. *Hans v. Ohio State Univ. Med. Ctr.,* 10th Dist. No. 07AP-10, 2007-Ohio-3294. Dr. Dunsker's assertion of immunity in his answer to appellants' 1998 complaint, along with the "Record of Operation" listing Dr. Kokkino as a resident, provided ample reason for appellants to believe there might be an issue making the Court of Claims an appropriate forum in which to file suit.

{¶41} This court recently addressed a similar argument in *Clevenger v. Univ. of Cincinnati College of Medicine,* 10th Dist. No. 09AP-585, 2010-Ohio-88. There, the plaintiff failed to initiate litigation in the Court of Claims within one year of the alleged medical malpractice. The plaintiff argued that a new theory of discovery regarding a tort claim should be developed and applied to her case - a claim for medical malpractice does not accrue until the patient or her counsel are certain which court is the appropriate court in which to pursue the claim. This court declined to adopt this proposition of law, stating, "[w]e find no case law to support this theory and will defer to the Supreme Court of Ohio to add or not to add this theory to the law of Ohio." Id. at ¶16.

{¶42} We also stated in *Clevenger* that, because the plaintiff was on notice that issues regarding immunity might well have been present in the case, "[t]he prudent course of action would have been to file suit in both the Ohio Court of Claims and the Court of Common Pleas for Hamilton County, Ohio and then submit the immunity issue to the Court of Claims in order to determine which court was the appropriate forum." Id. at ¶17. Although the facts of *Clevenger* differ from those in the instant case, i.e., Clevenger's surgery was performed in 2007, after *Theobald* was decided, we believe this court's assertion applies to the instant case.

{¶43} As noted, Dr. Dunsker's 1999 deposition demonstrates that he asserted a claim of immunity in his answer to appellants' 1998 complaint. Appellants and counsel were thus on notice that issues regarding immunity might well be present in this case. Thus, as this court averred in *Clevenger,* appellants' prudent course of action would have been to file suit in both the Ohio Court of Claims and the Court of Common Pleas for Hamilton County. W hile burdensome, this may be the prudent course of action in every medical malpractice case filed.

{¶44} Appellants further contend they were not provided an opportunity to address UC's motion to dismiss prior to the Court of Claims rendering its decision granting the motion. We construe appellants' argument to contend that the Court of Claims abused its discretion in failing to conduct an evidentiary hearing on the motion. As UC points out, appellants filed a response to the motion, but never requested a hearing. Further, appellants did not mention the pending motion at Dr. Dunsker's August 13, 2009

immunity hearing. Because a trial court is confined to the allegations in the pleadings, a trial court does not abuse its discretion in failing to conduct an evidentiary hearing as factual findings are not required to determine the merits of a Civ.R. 12(B)(6) motion. *Savage v. Godfrey* (Sept. 28, 2001), 10th Dist. No. 01AP-388 (holding that a trial court did not err in denying a motion for oral hearing on a Civ.R. 12(B)(6) motion to dismiss, as "motions may be decided wholly on papers, and the dismissal of a complaint without an oral hearing does not violate due process").

{¶45} Accordingly, the Court of Claims did not err in concluding that the one-year statute of limitations applicable to medical malpractice actions against the state barred the allegations in appellants' complaint. We thus overrule appellants' fifth assignment of error.

{¶46} Appellants' sixth and seventh assignments of error contend the Court of Claims erred in failing to address the issues of "fundamental agency law" and "informed consent." We note initially that the arguments presented in these two assignments of error are essentially the same, that is, that Schultz was never informed of Dr. Dunsker's state employment and, therefore, could not have consented to be treated by a state employee. In *Fisher*, this court rejected the same argument, averring that "whether appellant was informed and/or consented to Dr. Mullen treating her as a 'loaned servant,' [is] irrelevant to the determination of whether Dr. Mullen was employed by the state pursuant to R.C. 2743.02(F)." Accordingly, we overrule appellants' sixth and seventh assignments of error.

{¶47} Appellants' tenth and final assignment of error contends the Court of Claims erred in granting UC's Civ.R. 12(B)(6) motion to dismiss appellants' complaint by considering factual matters outside the pleadings. Appellants have taken out of context portions of the court's decision and judgment entry pertaining to the determination of Dr. Dunsker's immunity in arguing that the Court of Claims looked outside the pleading when applying Civ.R. 12(B)(6). A thorough reading of the decision and judgment entry demonstrates that the Court of Claims applied the proper standard in granting UC's motion to dismiss. Accordingly, we overrule appellants' tenth assignment of error.

{¶48} Based upon the foregoing, appellants' first, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error are overruled, the second assignment of error is rendered moot, and the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 09AP-900
(C.C. No. 2008-06431)
(REGULAR CALENDAR)

James W, Schultz et al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
University of Cincinnati	)
College of Medicine et al.,	)
	)
Defendants-Appellees.	)
	)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on May 11, 2010, appellants' first, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth assignments of error are overruled, appellants' second assignment of error is moot, and it is the judgment and order of this court that the judgment of the Ohio Court of Claims is affirmed. Costs are assessed against appellants.

BROWN. J., TYACK, P.J., & FRENCH, J.

/s/ Susan Brown
Judge Susan Brown

APPENDIX B

COURT OF CLAIMS OF OHIO

Case No. 2008-06431

[Filed September 1, 2009]

JAMES W. SCHULTZ, et al.	)
	)
Plaintiffs	)
	)
v.	)
	)
UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE	)
	)
Defendant	)
	)

Judge Clark B. Weaver Sr.

DECISION

On August 13, 2009, the court conducted an evidentiary hearing to determine whether Stewart Dunsker, M.D. is entitled to civil immunity pursuant to R.C.2743.02(F) and 9.86. Upon review of the testimony and evidence presented at the hearing, the court makes the following determination.

R.C. 2743.02(F) states, in part:

"A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action."

R.C. 9.86 states, in part:

"[N]o officer or employee [of the state] shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."

The Supreme Court of Ohio has held that "in an action to determine whether a physician or other health-care practitioner is entitled to personal immunity from liability pursuant to R.C. 9.86 and 2743.02[F], the Court of Claims must initially determine whether the practitioner is a state employee. If there is no express contract of employment, the court may require other evidence to

substantiate an employment relationship, such as financial and corporate documents, W-2 forms, invoices, and other billing practices. If the court determines that the practitioner is not a state employee, the analysis is completed and R.C. 9.86 does not apply.

"If the court determines that the practitioner is a state employee, the court must next determine whether the practitioner was acting on behalf of the state when the patient was alleged to have been injured. If not, then the practitioner was acting 'manifestly outside the scope of employment' for purposes of R.C. 9.86. *If there is evidence that the practitioner's duties include the education of students and residents, the court must determine whether the practitioner was in fact educating a student or resident when the alleged negligence occurred." Theobald v. University of Cincinnati,* 111 Ohio St. 3d 541, 2006-Ohio-6208, ¶30-31. (Emphasis added.)

At all times relevant, Dr. Dunsker was a full professor of neurosurgery at the University of Cincinnati (UC). (Defendant's Exhibit B.) He also provided clinical care to patients at the Christ Hospital through his private practice group, the Mayfield Clinic. Dr. Dunsker stated that he had received income both from UC and the Mayfield Clinic, with the largest portion coming from clinical practice. According to Dr. Dunsker, he retired from the practice of neurosurgery in 2002.

On January 13, 1997, using an anterior approach, Dr. Dunsker performed surgery on plaintiff's cervical spine to relieve pain and pressure originating from a vertebra in plaintiff's neck. According to the complaint,

plaintiff suffered injury to his laryngeal nerve during the operation and such injury has affected plaintiff's ability to speak in a normal tone of voice.

Initially, the court finds that Dr. Dunsker's position as a full professor at UC clearly qualifies as state employment. Thus, the issue before the court is whether Dr. Dunsker was acting on behalf of the state at the time when the alleged negligence occurred and, inasmuch as there is evidence that Dr. Dunsker's duties included the education of residents, whether he was in fact educating a resident at the time ofthe alleged negligence.

In the present case, defendant submitted a "Record of Operation" that listed the medical personnel who were present in the operating room during plaintiff's surgery which lasted from approximately 7:20a.m. until 2:00 p.m. (Defendant's Exhibit F.) The form lists Dr. Dunsker as the surgeon and identifies Dr. Kokkino as the resident. Dr. Dunsker testified that the form was usually filled in by the circulating nurse at pertinent times throughout the procedure and that the form contained his signature. Dr. Dunsker admitted that he had no specific recollection of this operation but that, based upon the record, he was assisted by Dr. Kokkino who was then a neurosurgical resident. Dr. Dunsker explained that this particular operation was such that it required "four hands" to facilitate retraction of the tissues of the patient's neck in order that the surgeon could visualize the operative site.

As stated in *Theobold*, supra, "'[i]n many instances, the line between [the physician's] roles (practicing and teaching) is blurred because the practitioner may be teaching by simply providing the student or resident

an opportunity to observe while the practitioner treats a patient.'" Id. at ¶16 quoting *Theobald v. Univ. of Cincinnati,* 160 Ohio App.3d 342, 2005-Ohio-1510, ¶34. In affirming the holding of the Tenth District Court of Appeals, the Supreme Court agreed that "the question of scope of employment must turn on what the practitioner's duties are as a state employee and whether the practitioner was engaged in those duties at the time of an injury." Id. at ¶23. The Court of Appeals had explained that "anytime a clinical faculty member furthers a student or resident's education, he promotes the state's interest. Because the state's interest is promoted no matter how the education of the student or resident occurs, a practitioner is acting within the scope of his employment if he educates a student or resident by direct instruction, demonstration, supervision, or simple involvement of the student or resident in the patient's care." *Theobald,* supra, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶47.

The *Theobald* decision supports a finding of immunity in situations where a state-employed attending physician is furthering the state's interest by educating a resident who assists in a surgical procedure under the direct supervision of the surgeon. Id. Dr. Dunsker confirmed that he would have been teaching surgical techniques to the resident during the procedure. Based upon Dr. Dunsker's testimony and the Record of Operation, the court finds that a resident was present for the purpose of education and that Dr. Dunsker was furthering the interests of the state in his care and treatment of plaintiff when the alleged negligence occurred.

In his argument at the hearing, plaintiff's counsel asserted that Dr. Dunsker had waived the defense of immunity during an exchange that occurred between counsel at Dr. Dunsker's deposition in 1999. (Plaintiff's Exhibit 3.) Upon review, the court finds that the evidence is insufficient to support a finding that plaintiff communicated his intent to waive the defense of immunity.

To the extent that plaintiff has asserted in his complaint or during oral argument that Dr. Dunsker's conduct was reckless and was, therefore, outside the scope of his state employment, the court finds that plaintiff has failed to meet his burden of proof. Ohio courts have held that "'[t]he actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.'" *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, quoting 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500. In the instant case, the court finds that there is a paucity of evidence to establish that Dr. Dunsker acted in a reckless manner toward plaintiff.

Based upon the totality of the evidence presented, the court concludes that Dr. Dunsker's duties as a state-employed professor of neurosurgery included treating patients at both UC and at Christ Hospital, and that he was engaged in those duties at the time of the alleged negligence. Consequently, the court

concludes that Dr. Dunsker is entitled to civil immunity pursuant to R.C. 9.86 and 27 43.02(F), and accordingly, the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

The court notes that on June 17, 2008, defendant filed a motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6), wherein defendant asserts that plaintiff's action is barred by the statute of limitations. On July 7, 2008, plaintiff filed a response. On August 7, 2008, the court granted instanter defendant's motion for leave to file a reply. By entry dated October 2, 2008, the court held the motion in abeyance pending its immunity determination. Inasmuch as Dr. Dunsker is entitled to civil immunity, the court next turns to defendant's motion.

In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk* Co. (1988), 40 Ohio St. 3d 190. Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242. Additionally, dismissal under Civ.R. 12(B)(6) based upon a statute of limitations is proper only when the face of the complaint conclusively shows that the action is time-barred. *Leichliter v. Natl. City Bank of Columbus* (1999), 134 Ohio App.3d 26.

R.C. 2743.16(A) provides:

"Subject to division (B) of this section, civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action *or within any shorter period that is applicable to similar suits between private parties.*" (Emphasis added.)

R.C. 2305.113(A) provides, in relevant part:

"Except as otherwise provided in this section, an action upon a medical, dental, optometric, or chiropractic claim shall be commenced within one year after the cause of action accrued."

In Ohio, a medical claim accrues and the statute of limitations begins to run pursuant to the rule of law set forth by the Supreme Court of Ohio in *Frysinger v. Leech* (1987), 32 Ohio St.3d 38, wherein the court held that "a cause of action for medical malpractice accrues and the statute of limitations commences to run (a) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered the resulting injury, or (b) when the physician-patient relationship for that condition terminates, *whichever occurs later.*" (Emphasis in original.) Id. at 41-42. The second prong of the *Frysinger* test is known as "the termination rule."

Plaintiff's cause of action accrued on January 13, 1997, when the laryngeal nerve was injured, allegedly as a result of some negligence by agents or employees of UC. The complaint was filed on May 22, 2008. Plaintiff has not alleged that he has continued to

receive treatment from Dr. Dunsker. Indeed, Dr. Dunsker testified that he retired in 2002, some seven years before this complaint was filed.

Plaintiff argued, in the alternative, that the statute should be tolled until such time as plaintiff discovers that the physician intends to assert an immunity defense. Plaintiff pointed out that Dr. Dunsker did not identify himself to plaintiff as a state employee prior to obtaining consent for surgery. Nevertheless, the Supreme Court addressed a similar argument in *Theobald* and dismissed such, stating "[t]he Theobalds also ask us to require a health-care practitioner to obtain informed consent from a patient, except in emergency situations, in order to assert the defense of personal immunity under R.C. 9.86. The statute does not require informed consent, and we will not read such a requirement into the statute. Instead, the Theobalds should direct this argument to the General Assembly." *Theobald,* supra, at ¶32.

For the foregoing reasons, the court concludes that plaintiff's action is time-barred. Defendant's motion to dismiss shall therefore be granted and plaintiff's complaint shall be dismissed, pursuant to Civ.R. 12(B)(6).

COURT OF CLAIMS OF OHIO

Case No. 2008-06431

[Filed September 1, 2009]

JAMES W. SCHULTZ, et al.	)
	)
Plaintiffs	)
	)
v.	)
	)
UNIVERSITY OF CINCINNATI COLLEGE OF MEDICINE	)
	)
Defendant	)
	)

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

The court held an evidentiary hearing to determine civil immunity pursuant to R.C. 9.86 and 2743.02(F). Upon hearing all the evidence and for the reasons set forth in the decision filed concurrently herewith, the court finds that Stewart Dunsker, M.D. is entitled to immunity pursuant to R.C. 9.86 and 2743.02(F) and that the courts of common pleas do not have jurisdiction over any civil actions that may be filed against him based upon the allegations in this case.

For the additional reasons set forth in the decision, defendant's motion to dismiss is GRANTED and plaintiff's complaint is DISMISSED, pursuant to Civ.R. 12(B)(6). Court costs are assessed against

plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

/s/ Clark B. Weaver Sr.
CLARK B. WEAVER SR.
Judge

cc:

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APPENDIX C

THE SUPREME COURT OF OHIO

Case No. 2010-1099

[Filed September 29, 2010]

James W. Schultz et al.)
)
v.)
)
University of Cincinnati)
College of Medicine et al.)
)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 09AP900)

/s/ Eric Brown
ERIC BROWN
Chief Justice

APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 2010-1099

[Filed December 1, 2010]

James W. Schultz et al.)
)
v.)
)
University of Cincinnati)
College of Medicine et al.)
)

RECONSIDERATION ENTRY

Franklin County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Franklin County Court of Appeals; No. 09AP900)

/s/ Eric Brown
ERIC BROWN
Chief Justice

APPENDIX E

Constitutional and Statutory Provisions

Ohio Const., Article I - Bill of Rights

§ 2 Right to alter, reform, or abolish government, and repeal special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code § 109.36(A)(1): "Officer or employee" means any of the following:

(a) A person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state.

(b) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(c) A person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.

(d) A person who, at the time a cause of action against the person arises, is rendering medical services to patients in a state institution operated by the department of mental health, is a member of the institution's staff, and is performing the services pursuant to an agreement between the state institution and a board of alcohol, drug addiction, and mental health services described in section 340.021 of the Revised Code. [emphasis added]

Ohio Revised Code § 9.86 Immunity of public officers and employees" states:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to Chapter 2743. of the Revised Code.

Effective Date: 03-13-1980

2743.02 State waives immunity from liability.

(A)(1) The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this

chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) or (3) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

* * * *

(E) The only defendant in original actions in the court of claims is the state.

Effective Date: 09-26-2003; 03-31-2005; 01-13-2005